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No. 118.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1906.

MERCHANTS HEAT & LIGHT COMPANY,
Plaintiff in Error.

vs.

JAMES B. CLOW & SONS,
Defendant in Error.

Writ of Error to Circuit Court, Northern District of Illinois.

BRIEF OF DEFENDANT IN ERROR.

NEWTON WYETH,
WARREN B. WILSON,
ATTORNEYS FOR DEFENDANT IN ERROR.

WALTER L. FISHER,
OF COUNSEL.

BARNARD & MILLER, PRINTERS, CHICAGO

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STATEMENT.

The defendant in error, a corporation organized under the laws of the State of Illinois, having its principal office and place of business in Chicago, in the Northern District of Illinois, brought in the Circuit Court of the United States, for the Northern District of Illinois, action of assumpsit, for goods sold and delivered, against the plaintiff in error, a corporation organized under the laws of the State of Indiana, having its principal office and place of business at Indianapolis. Summons was issued and served on the defendant in the manner provided by the statute of Illinois by "reading the same to W.

H. Schott, general manager of said company, the president and other officers not being found in the district." (Transcript of Record, p. 3.) The statute is as follows:

> "An incorporated company may be served with process by leaving a copy thereof with the president if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county."
>
> Sec. 4, Ch. 110, Rev. Sts. Ill.

The defendant appeared specially for the purpose and

> "moved the court to quash the return of the marshal upon the summons issued in said cause * * * for the reason that said defendant is and was at the time this action was commenced, and ever since has been, a corporation organized and existing under the laws of the State of Indiana, and engaged in business only in said state, and never has had any office, place of business or agency in Illinois." (Tr., p. 13.)

This was supported by an affidavit of Mr. Schott, that he was a resident and citizen of Chicago, an engineer and contractor, and had and maintained offices in the Marquette Building, Chicago. That for six months past he had been engaged in installing a light and heat plant at Indianapolis for the defendant, which was an Indiana corporation not engaged in business at Chicago or Illinois, as affiant is informed and believes. (Tr., p. 13.)

Also an affidavit of William C. Bobb, that he was president of defendant, that it was an Indiana cor-

poration, that it had no office, and was not engaged in business in Illinois. (Tr., p. 14.)

The plaintiff opposed the motion, and filed an affidavit of William E. Clow, that he was the vice-president and manager of the plaintiff, James B. Clow & Sons; that he knew Schott and had had repeated conferences with him about the matters in controversy; that throughout the whole matter Schott acted as the general manager and representative of defendant; that during the whole time Schott maintained an office at Chicago; that all the business between plaintiff and defendant had been done at that office, frequent conferences being held there, Schott always representing the defendant, and that said office was continuously treated as the office of the defendant and Schott as its only representative; that Schott was a resident of Chicago, and general manager of the defendant company, was so advertised, named as such on the letter-heads of the defendant, and said office in Chicago has been continuously recognized and treated as the office of the defendant as shown specially by letters and telegrams submitted. (Tr., p. 15.)

A number of letters and telegrams were also submitted from the defendant to the plaintiff all relating to the particular matter in controversy and signed, "The Merchants' Heat and Light Co., by W. H. Schott, general manager." Some of these letters are from the Indianapolis office with letter-heads showing Mr. Schott the general manager, others from this Chicago office, but all signed as indicated,—the Company, by W. H. Schott, Gen. Mgr." (Tr., pp. 16, 17, 18, 19.)

This office was otherwise treated as the office of the Company. Thus, on December 27, 1902, the plaintiff received this telegram from defendant:

> "Indianapolis, Ind., Dec. 27, 1902. James B. Clow & Sons, Chicago, Illinois. See Mr. Schott at Chicago office Monday 10 A. M. Merchants' Heat and Light Company." (Tr., p. 18.)

An affidavit of Horatio S. Collins was also filed, setting out that he was city salesman for plaintiff, and as such conducted for plaintiff the negotiations resulting in the contract between plaintiff and defendant, under which the goods in question were delivered by plaintiff to defendant; that all the negotiations were had at said office, and Schott in them all acted for and represented the defendant; that the contract was finally made August 13, 1902, at the said office in Chicago, Collins signing for plaintiff and the defendant signing its name, "by W. H. Schott, general manager." That the defendant regularly advertised Schott as its general manager in its letter-heads; all correspondence was done by Schott. That during all this time Schott maintained the office at Chicago and all the negotiations were had and the contract signed at said office in Chicago; that affiant verily believes that the said Schott was the regularly authorized agent of the defendant in Chicago and the said office maintained by Schott in Chicago was the regular office of the defendant; that no visible change had taken place in said office, and all the business had been conducted for the defendant by Schott. (Tr., pp. 19, 20.)

The contract, the basis of this suit, provided for the sale and delivery by the plaintiff to the defend-

ant by October 1, 1902, of a large quantity of different kinds of pipe, valves and fittings. This contract is dated Chicago, was executed and delivered at the Chicago office, and signed by defendant, "Merchants' Heat & Light Company, by W. H. Schott, general manager." (Tr., p. 21.)

The motion to quash was overruled, and the defendant ruled to plead in thirty days. (Tr., p. 22.) And the defendant filed a bill of exceptions, showing the foregoing matters. (Tr., p. 12.)

The defendant then filed (Aug. 14, 1903) the general issue (Tr., p. 6) and therewith a notice of set-off, claiming that the plaintiff was indebted to the defendant in the sum of $15,000 by reason of damages alleged to have resulted from delay in delivering pipe, valves and fittings within the time stipulated by contract of Aug. 13, 1902. (Tr., pp. 6, 7.) Also an additional notice of set-off was filed March 29, 1905, claiming $4,000 for over-payments. (Tr., p. 8.) These demands were shown in a bill of particulars filed Dec. 3, 1903, aggregating $20,831.89. (Tr., pp. 8, 9.) The affidavit of plaintiff's claim was $9,391.01. (Tr., p. 6.)

The statute of Illinois as to set-off is as follows:

> "The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof, under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. And if it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant, and

certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense. If the cause is tried by the court, the finding and judgment shall be in like manner."

Sec. 29, Ch. 110, Rev. Sts. Ill.

"When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."

Sec. 30, Ch. 110, Rev. Sts.

A jury was waived by stipulation, this stipulation being without prejudice to the right of the defendant to raise the question of jurisdiction which had been theretofore presented, and a trial had before the court. The set-offs and counter claims were disallowed, except one item of $18.00, and a deduction was made of $317.16 for freight paid by defendant (Tr., pp. 27, 28.) and a judgment was rendered for the plaintiff for $9,082.21. (Tr., p. 12.)

The question of jurisdiction was further gone into at the hearing and a special finding of facts and conclusion of law made and filed in accordance with the written stipulation and preserved by bill of exceptions. (Tr., 23.) The conclusion of law on jurisdiction was that the "defendant was during all the time from August 12, 1902, to the commencement of suit doing business in Chicago, Illinois, and during all that time William H. Schott was its general managing agent. Service of summons was properly made upon him as such agent." (Tr., 28.)

The case is brought directly to this court by writ of error on the questions of the jurisdiction only of the Circuit Court, which are:

1. Were William H. Schott's relations to the defendant company such that service upon him in Chicago constituted service upon the defendant, an Indiana corporation, in the Northern District of Illinois?

2. Was the filing of the counter claim by the defendant and trial thereon a waiver of the jurisdictional question and to be properly construed as a submission to the jurisdiction of the court?

BRIEF.

The general jurisdiction of the Circuit Court arising from diversity of citizenship of the parties is not in question in this case, but it is urged by the plaintiff in error that the service of process had in Illinois was not upon an officer or agent of the defendant, such as to give the Circuit Court jurisdiction to render the judgment in question against the defendant, and that the defendant was not doing business in Illinois at the time of service. The defendant in error, plaintiff below, submits that the Circuit Court had jurisdiction upon this record to render such judgment.

I. The defendant was properly served with process.

II. If not properly served, the objection was waived by filing and going to trial upon the notice of set-off.

While, in suits at law, that service of process which subjects a party in a court of competent jurisdiction under the state law, is sufficient process to the same end in such suits when brought in the federal courts (*Van Dresser* v. *Oregon R. Co.*, 48 Fed., 202, 205), and the service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is held valid by the state courts, will be recognized by the federal courts, yet the defendant in error bears in mind that such rule of the federal

courts is "subject to the fundamental principle that no one shall be condemned unheard or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceedings as is fair and reasonable, and the federal courts must judge for themselves whether the mode of service prescribed by the laws of a particular state satisfies these requirements." (*McCord Lumber Co.* v. *Doyle*, 97 Fed., 22.)

I.

The defendant, an Indiana corporation, was properly served with summons in the Northern District of Illinois upon William H. Schott, its general manager in the district.

The only questions affecting the legality of this service are:

1. Was Schott an agent of the defendant of character to be substantially representative of the defendant?

2. Was the defendant doing business in Illinois?

The service was valid.

It was made in exact accordance with the statute of Illinois for service on non-resident corporations.

> "An incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county."
>
> Sec. 4, Ch. 110, Rev. Sts., Ills.

This statute applies to non-resident corporations.

Hannibal & S. J. R. R. Co. v. *Crane,* 102 Ill., 255.

Such service made in accordance with the local statute is valid unless so grossly unfair as to amount to denying a hearing.

Barrow S. S. Co. v. *Kane,* 170 U. S., 100.

Lafayette Ins. Co. v. *French,* 18 How., 404.

There is no question that this is a just statute providing for reasonable service and that service was made in strict accordance with its requirements.

1.

There is no question but that Schott, the "agent" upon whom service was had, on March 23, 1903, was an agent of sufficiently broad authority to represent the defendant and receive service.

The findings of fact show that he was substantially invested with all authority for the company. He was the "general manager," having full control over and charge of the entire construction and operation of the plant of the company and of the entire business of the company, including the making and execution of the contract with the plaintiff and all the transactions involved in this litigation. See findings of facts, Tr., pp. 23, 24.

While the apparent agency and authority of Schott, as general manager of the defendant, held out by the defendant, and by the transactions of Schott on its behalf, which it approved, would appear unquestionably to make Schott such an agent in Chi-

cago as that service upon him there would be good, yet the actual relations and authority of Schott as they existed between him and the defendant would, if they increased his authority in fact beyond that which it appeared to be, be evoked upon discovery to support the service. It developed at the trial that by contract entered into August 7, 1902, between the defendant and Schott, the latter agreed to construct, instal and equip the plant of the defendant at Indianapolis, and to that end purchase all materials and apparatus, employ all labor and personally superintend the construction, assume the general management of the plant and operate it for the company until fully completed, secure all business for the plant and approve contracts therefor, institute a system of bookkeeping, certify bills, have the heating plant ready for service December 1, 1902, and finally finished on or before July 1, 1903. The company was to pay Schott the sum of $275,079.38 for the plant, and his compensation was to be 10 per cent. on all bills for construction. It thus appears that the entire business of the defendant, until such plant should be completed and turned over, was under the absolute control and management of said Schott, and under such control all of the business of the defendant in the way of purchases, procurement of materials and settlements therefor, as well as other details, were carried on by Schott in the name of the company. (Tr., p. 24.)

It is further found that said Schott continued to be the general manager of the defendant until July, 1903, long after service of summons on said Schott at his office in Chicago; that "at this time the con-

struction of the plant had not been entirely completed," and that "said Schott was still acting as general manager as to such construction, and any business of defendant required to be done in Illinois, such as the purchase of cables, engines, boilers, generators, pipes, fittings and other supplies, for the extension of the plant, was done for defendant by said Schott as general manager down to a time later than the beginning of this action," and that the City of Chicago was the principal market for supplies of the kind sold by plaintiff to defendant, and of the kind enumerated in the finding. (Tr., p. 24.)

About the 1st of January, 1903, a controversy arose between the parties in respect of the final payment under the contract, and the right of the defendant to set off damages for the delay in the delivery of the pipe contracted to be sold to defendant, and frequent interviews were held at the office of said Schott in Chicago between him as general manager of the defendant and the agents or attorneys of plaintiff in respect to the adjustment of the controversy. (Tr., pp. 24, 25.)

This controversy was not settled, whereupon this suit was brought March 23, 1903.

The fact that Schott may, at some time, have had other cases on hand for other companies for similar business to that of the defendant (the record does not disclose whether he actually had such cases) does not subtract from the fact that he fully represented this defendant. It cannot be said that he the less represented the defendant because he may also have represented other similar enterprises, unless it

be said that by representing all he represented none. The record discloses the nature of the special business to which he devoted himself, and it does not appear that he was at the time actually interested in any other business whatever.

2.

The defendant was doing business in Chicago.

There is no special difficulty about the law on this subject.

Corporations, unlike individuals, can act or be served with process through agents only.

Corporations are residents of the state where created.

The officers and agents of corporations do not ordinarily carry their corporate functions with them outside of the state.

It was the original theory that corporations could not "migrate" or be found for any purpose outside the state in which they were created.

Bank of Augusta v. *Earle*, 13 Pet., 584.

The result of all this was that while corporations could "migrate" and be found in other states for the purpose of doing business, for the purpose of taking the benefit of their contracts and bringing suit to enforce their rights, they could not "migrate" for the purpose of being sued. That they were in other states for the purpose of making and enforcing their contracts, but not for the purpose of being made to perform them. That they could

get all the benefits but none of the liabilities resulting from their presence in other jurisdictions.

This condition was intolerable, and the conclusion was soon reached that if the corporation by its agent could be in a foreign state for the purpose of making contracts, it was there for the purpose of being sued. The idea that a corporation was part of the sovereignty that created it or anything but a method by which persons associated themselves together for a common purpose was abandoned, and the ability of corporations to transact business away from home was recognized.

Lafayette Ins. Co. v. *French*, 18 How., 404.

That a corporation did business in a foreign state only by the courtesy of that state, which could impose any reasonable conditions upon that permission. That the requirement that it submit to service of process in that state was reasonable.

Lafayette Ins. Co. v. *French*, 18 How., 404.
St. Clair v. *Cox*, 106 U. S., 350.

Then that the existence of laws for the service of process on foreign corporations carried an implied consent by any foreign corporation coming into the state to do business there that it might be served in that manner.

The question, as stated in *Lafayette Ins. Co.* v. *French*, 18 How., 404, was this:

> "In this instance, one of the conditions imposed by Ohio was, in effect, that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation should also be deemed its agent to re-

ceive service of process in suits founded in such contracts.

"Now, when this corporation sent its agent into Ohio, with authority to make contracts of insurance there, the corporation must be taken to assent to the condition upon which alone such business could be there transacted by them."

That language is strictly applicable here. In this case, one of the conditions imposed by Illinois was in effect that the agent who should reside in Illinois and have an established place of business in Illinois and enter into this contract and carry it out in Illinois and at the place of business established for such purpose in behalf of the foreign corporation should be deemed its agent to receive service of process in suits founded on such a contract.

Now, when the corporation sent its agent Schott into Illinois with authority to make and carry out contracts, extending as it did, over months of time, the corporation defendant here must be taken to have consented to the condition upon which alone such business could be transacted by it.

The later cases fully sustain this doctrine, also, that the authority of the agent to receive service of process did not expire with the making of the contract. When an insurance company had entirely withdrawn from the State of Tennessee and was taking no further risks, but had policies unsettled, it was held that it was still doing business in the state; the point being that made in *Lafayette Ins. Co.* v. *French*, 18 How., 404, that if the foreign corporation went into the state for the purpose of

making and taking the benefit of the contract, it was there for the purpose of being made to perform it.

Connecticut Mut. L. Ins. Co. v. *Spratley*, 172 U. S., 602.

We apprehend that the test of what is "doing business" within a state by a foreign corporation, such as to render service of process upon an agent attending to such business valid, is not necessarily that the business must be the same as would be required to lay the corporation open to a penalty for failure, for instance, to file a copy of its articles of incorporation, or to pay certain license fees, or the like, where the statute calls for such act before the corporation shall do business within the state. There might well be a certain permanence or continuity of business, before such laws would be considered as violated by failure to file articles or to do other acts required, although an examination of the decisions of the courts can give little comfort to foreign corporations in this respect. But, be that as it may, can there be any doubt that service of process upon an agent or officer of the corporation engaged in or attending to the business, whatever it is, would be valid service upon the corporation, especially with respect to a controversy growing out of that very business? Schott was certainly the agent of the defendant carrying on its business so fully and to such a degree that at many dates prior to March, 1903, service would have been unquestioned, and at the time Schott was served, he was within the territorial limits of the jurisdiction, where he was on the sole business of the defendant, both in respect to completing and carrying on the plant and busi-

ness of the defendant at Indianapolis and in respect to the controversy with the plaintiff which was still unsettled, and therefore the business of the defendant, with Schott as representative, still continued relations of agency, sufficient for the purpose of service of process upon him as agent of the defendant.

The fact that the defendant did not pay the rent of the office in Chicago is not material. No special fact or form is necessary to show the liability of the foreign corporation to service.

The courts have frequently said they would not attempt to define fraud, as, fraud being a thing to be concealed or disguised, if any particular form or fact was found to be essential that fact or that form would be studiously avoided or disguised.

The same reasoning holds good here.

A foreign corporation defendant always desires to escape liability to answer to the citizens of a foreign state in their home courts for liability upon contracts made with them in their own states, and if any particular form was held to be essential, as the painting the name on a door of an office or the establishment of an office or the payment of rent, or anything else, that form would be studiously avoided.

In *Board of Trade* v. *Hammond Elevator Co.*, 198 U. S., 424, the defendant took all possible steps to escape this liability. It was a Delaware corporation, having an office at Hammond, Indiana. Certain brokers established offices in Chicago, took and transmitted orders to the corporation at Hammond,

but the contract expressly denied that they were agents of the defendant. The orders were professedly taken on behalf of the brokers, who claimed to be acting on their own account, in every detail. Upon the surface the persons upon whom service was had, and whose dealings were held to be doing business by the defendant in Illinois, professed to act on the own account, but the court went back of all these forms and said that in substance and effect these orders were being taken for the benefit of the defendant, and that the defendant was therefore doing business in Illinois.

The cases in which jurisdiction was denied are cases in which the agents of the company were casually in the district upon their own business, as in *Goldy* v. *Morning News*, 156 U. S., 518. The manager of the News, a non-resident corporation, was casually in New York, on his own business, and not charged with any business of the corporation.

But here the agent was not casually but permanently in the district; he had an office regularly established in the Northern District of Illinois, in which he as the agent of the defendant regularly did the business of the defendant.

The name on the door was William H. Schott, Engineer and Contractor, and he paid the rent, but that is not at all the same thing as if he had a law office in Chicago and happened to be, for example, a member of the board of directors of this corporation. But his business transacted at that office was organizing just such heating and lighting corporations as this, and constructing this plant of the defendant. Finding No. 1, p. 23.

It is assumed that necessarily all of the business of the defendant would in time be done at Indianapolis, but up till and after the time when the process was served in this cause, the business of the defendant was the construction of the plant. A very essential part of that business of constructing the plant was securing the materials. That was a work requiring, as appears from this record, instant attention and the whole of it was committed to Schott and to be done at Chicago. The contract was made and carried out at Chicago by the company through Schott at this office. Finding No. 1.

The City of Chicago was and is the principal market for supplies of the character furnished by the plaintiff and required by the defendant in constructing its plant, and all of this business, not merely the making, but the executing, of this contract, spread over a series of months, and there was no visible change till after the service of process; all business except what was done by correspondence to Indianapolis was done at the office of Schott in Chicago and by Schott on behalf of the defendant. (Tr., p. 24.)

It would seem not to be doubtful that this company was doing business through Schott at Chicago, and that a service upon Schott at this office in an action upon the contract made and carried out by him at that office differs very essentially from service upon the manager of a foreign newspaper who might for one day for his own business or pleasure happen to be in New York.

This rule allowing service upon the agent of a corporation in a jurisdiction different from that of its

home office is a matter of substance and not of form. It is not a matter of contract or mere volition of the defendant; it is a liability forced upon it by the facts. No matter what form the corporation may give, if in fact it "migrates" to a foreign territory for the purpose of making and executing contracts and receiving the benefit of them, as was done in this case, through its agent, in an established place of business, where dealings are regularly carried on, it cannot thus be in a state for the purpose of receiving the benefit of its presence and not be in the state for the purpose of being subject to its liabilities.

This is the essence of *Lafayette Ins. Co.* v. *French*, 18 How., 404.

Barrow Steamship Co. v. *King*, 170 U. S., 100.

St. Clair v. *Cox*, 106 U. S., 350.

Board of Trade v. *Hammond Elevator Co.*, 198 U. S., 424.

Ex parte Schollenberger, 96 U. S., 369.

Houston v. *Filer & Stowell Co.*, 85 Fed. Rep., 757.

It is contended that the defendant was not doing business in Illinois, because:

1. The business being done was done by Schott personally and not by the company, the defendant company being only Schott's surety; the basis for this contention being the fact that the company agreed to pay Schott for his services as general manager during the construction period 10 per cent. of all bills, Schott in substance guaranteeing that

under his supervision the expense of installing the plant would be $275,079.38.

This position is not strongly contended for and is not believed to require any very serious answer. Whether what was done constitutes doing business or not is one question; but that whatever was done was done by the defendant corporation through its general manager, and not by Schott as an individual, is plain enough. There is not a suggestion of the individual anywhere.

The contract is signed "Merchants' Heat & Light Company, by W. H. Schott, general manager," not William H. Schott, with an addendum, "We guarantee the above. M. H. & L. Company."

Every letter, every telegram, every paper of any kind is signed "Merchants' Heat & Light Company, by W. H. Schott, general manager."

Even if a private contract had been shown between Schott and the company to the effect claimed, viz.: that Schott should do all these things himself and the company be his surety, that would in no way touch the rights of third parties.

The whole substance of the rule holding foreign corporations to answer in the domestic courts for failure to perform contracts which they "migrate" into this domestic territory to make and to take the benefit of, could be easily done away with if this doctrine were admitted. The insurance company, in such a case as *Lafayette Ins. Co.* v. *French,* 18 Howard, 404, could easily contract with its agents that they should not be agents but principals, that the agents should be liable primarily on the policies

and the company to be the sureties of the agent loaning him their credit. If that were allowed to establish that the company was not "doing business" in that place, a very simple way is found to reproduce the exact state of affairs the rule in *Lafayette Ins. Co.* v. *French, supra,* and the subsequent cases was established to prevent—*i. e.,* the foreign companies could again establish themselves in business in different jurisdictions and compel all persons seeking to enforce the contracts made with them to go to the remote home states of the corporations. They could take all the benefits of "migration" and refuse all the burdens. They could be always present in the other state to take all the advantage of such presence in making contracts and taking profits, and always absent when asked to perform their obligations there assumed.

If this was ever doubtful, *Chicago Board of Trade* v. *Hammond Elevator Company,* 198 U. S., 424, fully settled it. In that case the defendant, a Delaware corporation, carefully guarded in its contract with the persons doing business in Illinois against these persons being in any way made agents. The contracts made and things done were all in the names of the individuals; but the court looked at the substance rather than the form of the matter, and held in substance that the company was getting the substantial benefit of presence in Illinois through these persons and must take the burdens with the benefits, and held service of summons against the company on such persons was good, and that the activities of these persons constituted doing business in Illinois by the defendant company, not-

withstanding the plain, undisputed intent of the parties not to assume the relation of principal and agent, and that, too, for the express purpose of preventing the defendant company from being sued in the state where the business was done.

It is further so contended because:

2. What was done, even though done by the company, was not "doing business." It is argued:

> "It is believed that the solution of the question does not depend on the number of purchases but on the kind of business done. And it is submitted that the business done must be something in the line of that for which the corporation was organized." (Plaintiff in Error's Brief, p. 10.)

We fully agree with this statement as far as it goes.

When it is proposed to hold a non-resident corporation to defend a suit in the domestic court by reason of service of process on an agent or representative resident in the jurisdiction of the domestic court, the important question is, not whether the non-resident corporation has done many or few things in the state where the court is sitting through the agent upon whom process is served, but the "kind" of things done, whether many or few.

A New Jersey steamship company may employ a clerk in Illinois to address and mail advertising circulars and keep him constantly so employed, but the court in Illinois could not by service on such employe acquire jurisdiction over the steamship company in an action for damages for failure safely to carry merchandise. But if the steamship company

maintains in the jurisdiction an agent who only occasionally makes contracts on behalf of the company for the carriage of freight, service on such an agent would undoubtedly be good service on the company. The company would be "doing business."

The question varies with each case. In a sense, if a commercial corporation does anything anywhere it is "doing business" there, because such a corporation can never do anything but business.

But is the business done by the company through the agent served business of the same grade as that involved in the litigation? Is the business done through the agent such business as that an agent charged therewith can be considered fairly representative of the corporation in such matters as are involved in the suit in which service is attempted to be made on the corporation through that agent?

Thus, in *Fairbank Co.* v. *C., N. O. & T. Ry. Co.*, 54 Fed., 420, cited, the defendant company had a solicitor engaged continuously in soliciting patronage for the corporation in question. But service on such a solicitor was held not service on the company in an action for failure to carry safely goods delivered to the company.

The same thing is true of *Wall* v. *Chesapeake & C. Ry. Co.*, 95 Fed., 398.

If those cases can be defended at all, it is only on the ground that a solicitor not authorized to make on behalf of the company a contract for transportation or freight carriage or anything else, but only to talk about the advantages of the road, was not fairly

representative of the company; that the things done through such an agent were not so "doing business" as to make service on him in such a case service on the company. Or that he, having no authority to make contracts, and no contracts made, not even a ticket sold, the company could not be said to be doing business of any kind.

The test can hardly be that suggested by counsel for plaintiff in error, in the limited sense suggested, *i. e.*, "that the business done must be something in the line of that for which the corporation was organized." (Plaintiff in Error's Brief, p. 10.)

Of course, it must be that. The things done in the state must not be *ultra vires.*

Building its plant is just as clearly part of "that for which the company was organized" as operating it after it is built.

And there is no possible reason why, if, after its plant is completed, this corporation should establish an agency in Illinois for selling heat and light to persons there, service upon such an agent in an action for a breach of a contract made through such agent would be good service, that does not apply with exactly the same force to the present suit. When an agency is established to carry on for the company in Illinois an important part of the work of constructing the plant, viz.: contracting for and acquiring the necessary materials, and suit is brought on this contract made in Illinois, and service had upon the agent charged by the company with both making and carrying it out, the company through that agent is "doing business" and such

"business" that service of process on the agent doing it is service on the company.

The reason of the thing is the same in both cases. If the non-resident company has so far "migrated" into Illinois as to make contracts there and take the benefit of them, it has "migrated" sufficiently to be found there for the purpose of being made to perform them there.

The rulings of the District and Circuit Courts are not fully reconcilable. But it is submitted the principle is this, that a corporation accepting the privilege of "migrating" into a foreign state and doing business there does so *cum onere*. That the mischief of the old law sought to be remedied is this, that a corporation being held incapable of leaving the state of its origin, yet being allowed in fact to leave that state and go into other states and make contracts there, it was found that such corporations were in position to take the practical advantage of being in different states to make and enforce contracts and appropriate the profit, but could not be obliged to perform the obligations there assumed without going to the remote state of the origin of the corporation to bring the suit.

The principle required to remedy that mischief is that any corporation which through an agent goes into a foreign state sufficiently to make contracts, in the same way and by the same agent goes into that foreign state sufficiently to be found there and be duly served with process by service on that agent in any suit to enforce the contracts made through him or contracts of equal or no greater dignity.

The rule remains that an individual is not the corporation of which he happens to be an officer in every place where he may go to attend a fair at St. Louis or a Christian Endeavor Society in New Haven. But when he goes abroad as an agent to do business, the corporation may through that agent be sued to enforce the liabilities of the business.

This principle leaves no doubt here. Schott was not casually in Chicago to attend any World's Fair or Christian Endeavor Society. He lived here in Chicago, had a regular office at Chicago, at which the defendant through him regularly did business at Chicago, including the making, modifying and carrying out the particular contract in suit. If it was in Chicago enough to take the benefit of making and carrying out the business, it was in Chicago enough to be served with process through the same agent in the action to enforce that contract.

It seems to be thought that a selling agent stands upon a different footing from a purchasing agent. That a railroad company, for example, establishing an agency in a foreign state to make freight contracts is "doing business" and such contracts may be there enforced, but if the same company establish a purchasing agency with power to conclude contracts for supplies, especially construction supplies, that is not doing business. But this distinction is purely arbitrary. The principle is the same in both cases. If the company is in the state enough to make and take the benefit of its contracts, it is there enough to be made to perform them.

The case cited by plaintiff in error, *Lumberman Ins. Co.* v. *Myer*, 197 U. S., 407, illustrates the posi-

tion strongly. In that case a Pennsylvania insurance company having its principal office at Philadelphia negotiated a series of policies against loss by fire on property in New York. The company maintained no office in New York, but the whole business was done by correspondence. The property burned. Suit was brought on the policy in New York and service had on a resident member of the board of directors, whose sole duty consisted in attending annual directors' meetings in Philadelphia. This court held the service good. That the company was "doing business" in New York; that the making the policies implied that adjusters were to be sent to New York to adjust the losses; that the losses were payable at New York, because that was the domicile of the creditor. The company was practically having the benefit of possession in New York to make and take the profits arising from these contracts, and must be held to be there for the purpose of being made to perform them.

This case illustrates the principle and goes much further than is necessary to sustain the jurisdiction here.

II.

THE NOTICE OF SET-OFF AND TRIAL THEREOF WAIVED ANY DEFECT OF SERVICE.

General jurisdiction of the court not being in question, the right not to be sued in the particular district was a mere personal privilege, which, of course, it was competent for the defendant company to waive.

St. Louis, etc., R. Co. v. *McBride*, 141 U. S., 127.

Even if it were doubtful whether process had been properly served and the defendants therefore obliged to appear, any insufficiency in the service has been cured and waived by the defendant. In most jurisdictions it is held that if a defendant desires to question the authority of the court over him, by reason of defective service of process, he must remain out of that court, and that any general appearance cures any such defects, this being a personal right which he can waive, and his appearance and pleading to the merits being held to be a waiver of any defects and a consent that the court may exercise jurisdiction over him in that matter, and that this consent is final. In the federal courts, however, a modification of that rule has been introduced, and it has been held that where a defendant questions the legality of the process employed to bring him into court, and before entering a general appearance in any proper form, objects to the jurisdiction, then if the court insists on taking jurisdiction over his objection, he may contest on the merits the right of the plaintiff to recover, and such contestation does not waive the overruled objections to the jurisdiction of the court.

Harkness v. *Hyde*, 98 U. S., 476.

Southern Pacific Co. v. *Denton*. 146 U. S., 202.

The rule is stated thus:

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity, nor is the objection waived when, being urged, it is overruled, and the defendant is

> thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."
>
> *Harkness* v. *Hyde*, 98 U. S., 476, 479.

These cases, it may be conceded, would have authorized the defendant to file the general issue, as he did, or any plea contesting the right of the plaintiff to recover against him.

But this is not all that was done. A notice of set-off was filed with the general issue, with a bill of particulars, showing that the defendant claimed $20,831.89.

This notice of set-off, under the practice act of Illinois, was not a mere defense, but it was an affirmative suit by the defendant against the plaintiff.

What the defendant did by filing this notice of set-off was not merely a "contestation" of the right of the plaintiff to recover, but it was an affirmative request to the court to adjudicate the issue which it made by that notice, that issue being what amount of money is due from the plaintiff to the defendant upon this claim of $20,831.89. What amount of money is due from the defendant to the plaintiff upon the claim set up by it in the declaration and to render an affirmative judgment in favor of the defendant and against the plaintiff for the claimed excess due the defendant above that due the plaintiff? The statute of Illinois governing the matter is this:

"The defendant in any action brought upon any contract or agreement, either expressed or implied, having claims or demands against the plaintiff in such action, may plead the same, or give notice thereof, under the general issue, or under the plea of payment; and the same, or such part thereof as the defendant shall prove on trial, shall be set off and allowed against the plaintiff's demand, and a verdict shall be given for the balance due. *And if it shall appear that the plaintiff is indebted to the defendant, the jury shall find a verdict for the defendant, and certify to the court the amount so found; and the court shall give judgment in favor of such defendant, with the costs of his defense.* If the cause is tried by the court, the finding and judgment shall be in like manner." (Sec. 29.)

"When such plea or notice of set-off shall have been interposed, the plaintiff shall not be permitted to dismiss his suit without the consent of the defendant, or leave of the court."

Sec. 30, Ch. 110, Revised Statutes of Ill., Vol. III, Starr & Curtis, p. 3016.

The right to set-off, except as it is enforced in equity, is a matter of local legislation, and the federal courts sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state.

Charnley v. *Sibley,* 73 Fed., 980, 982.
Dushane v. *Benedict,* 120 U. S., 630.

Leave of the court has been held by Illinois decisions to mean a reasonable discretion by the court, and further, after such plea or notice of set-off the plaintiff cannot dismiss against the objection of the defendant.

City of E. St. Louis v. *Thomas,* 102 Ill., 435.
Butler v. *Cornell,* 148 Ill., 276.

The defendant filing such a notice of set-off so far from merely contesting the claim of the plaintiff becomes a plaintiff himself, even to the extent of disabling the plaintiff from dismissing the suit without the consent of the defendant or leave of the court. It is true the form of the notice filed does not make that demand, but that is not material. The statute does, and the plea filed is in the exact form in which pleas or notices under this statute are filed, under the practice in Illinois.

The notice says

> "that the defendant will set off and allow to the plaintiff against any demand on his part to be proved on such trial so much of the said sum of money so due the defendant as will be sufficient to satisfy such demand."

This, while nominally only offering a defense, is as a matter of law under the statute a demand for a judgment for any excess.

The form is the exact form used in the Illinois practice for a plea of set-off under this statute.

That is, the conclusion of the plea of set-off in the usual local form book is this:

> "The defendant is ready and willing and hereby offers to set-off and allow to the plaintiff the full amount of said damages."
>
> See Puderbaugh's Common Law, p. 89, Form 105.

The form of notice of set-off filed in the present case is an exact copy of the regular form used in Illinois under this statute. See Form 84, p. 151, Puderbaugh's Common Law, being the form from which this notice is exactly copied.

The defendant company did not confine itself to defenses, but brought the equivalent of an independent suit of its own, and one which it could have brought regardless of the outcome of the present suit.

The question of service was first presented on motion, affidavits and evidence submitted to Judge SEAMAN, who held the service valid. Those proceedings are preserved by a bill of exceptions. (Tr., p. 12.) This bill of exceptions was referred to by Judge SANBORN in his findings and treated by him as part of the facts before him, when he held the service valid on the question being presented a second time at the trial.

The first decision was apparently fully warranted, and, though the defendant had saved the point by its bill of exceptions, it probably concluded, not simply to defend, and depend upon a new suit of its own for recovery of its alleged damages and set-offs, but to ask the court to take jurisdiction of such other suit in the action already begun.

In Illinois, and elsewhere generally, right of recoupment, as well as of counter-claim and set-off, is not waived by failure to plead or give notice, or by refusing to give evidence thereon when admissible without such plea or notice.

Therefore, had the defendant been satisfied with pleading the general issue only, and trying the case without introduction of evidence on recoupment and set-off, it would in no respect have waived the question of service, could have presented the same on writ of error and, if successful, ousted the trial

court of jurisdiction; and such proceedings would meanwhile have been no hindrance to its prosecution of its own suit for its alleged damages and set-offs in any jurisdiction in which the plaintiff below might be found; and, further, should the judgment sought to be reversed in such supposed case be affirmed, the same would be no bar.

The only reason why defective service is held to be cured by an appearance is that the defendant is thereby presumed to have consented that the court may take jurisdiction. That implied consent is not so strong as this express affirmative assent. Here is an affirmative request to the court to take up the entire matter in controversy to determine how much is due the plaintiff and how much is due the defendant, and render a judgment in favor of the defendant for the claimed excess.

If the implied consent arising from the filing of a plea of the general issue is a waiver of defective service this express assent and express request of the court to take jurisdiction and render final judgment is much stronger. Objection having been taken originally to the court's assuming jurisdiction, and that objection being overruled, is held not to be waived by merely continuing to resist and oppose the court's assuming to determine the matter. But even though objection to the court's taking jurisdiction may in the earlier stages of the proceedings have been made, the objection to the jurisdiction may at any time be waived, it is still within the power of the defendant to waive that question, and where it not merely contests the right but affirmatively requests the court to assume jurisdiction and render a

judgment in its favor, as if it were a case in chancery and he files a cross-bill seeking affirmative relief, the right to object to the jurisdiction is gone.

The defendant in error therefore maintains that the judgment should be affirmed.

Respectfully submitted,

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